

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

60523

FILE: B-185182

DATE: February 11, 1976

MATTER OF: Spartan Oil Company, Inc.

98623

DIGEST:

1. Bidder's failure to acknowledge amendment may not be waived, notwithstanding amendment had net effect of decreasing performance cost, because portion of amendment which increased cost \$3,583 is not viewed as de minimus.
2. Failure to acknowledge material amendment to IFB, which was received and acknowledged by all other bidders, justifies rejection of bid even though bidder claims it was never received so long as there was no deliberate and conscious effort on part of agency to exclude bidder from competition. Also, allegation by bidder that it was aware of contents of amendment because of discussion at prebid conference and considered amendment in preparing bid does not negate necessity for acknowledging amendment, since bid responsiveness must be determined from bid itself.

On July 25, 1975, the Defense Fuel Supply Center issued invitation for bids (IFB) No. DSA600-76-B-0020 for the operation, maintenance and protection of the Defense Fuel Supply Point, Tampa, Florida. Three amendments were subsequently issued to the IFB and bids were opened on October 22, 1975.

The low bid was received from Spartan Oil Company, Inc. (Spartan), in the amount of \$8,075 per month. The second low bid of \$8,348.07 was submitted by Roarda, Inc. At bid opening it was discovered that Spartan had not acknowledged or returned amendment 0001 to the IFB. The contracting officer rejected the bid as nonresponsive because the amendment was considered to be material. Spartan protested the rejection to our Office on October 23, 1975.

On November 24, 1975, notwithstanding the pendency of the protest, award was made to Roarda based on a determination of urgency under section 2-407.8(b)(3) of the Armed Services Procurement Regulation (ASPR) (1975 ed.).

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Amendment 0001 added to the IFB clause L95 (Audit by Department of Defense) contained in Annex H of Defense Fuel Supply Center Master Solicitation No. 4 and ASPR § 7-104.41(a) (1975 ed.). The amendment also made the following additional changes:

1. Clause C89 added the requirement that the contractor's mechanic provide his own tool kit.
2. Clause F21(b) deleted the requirement that the contractor maintain 24-hour, 7-day a week, armed guard service.
3. Clause H77.100 was amended to require the contractor to treat certain areas of the facility with a herbicide.
4. Clause H77.100 was amended to require the contractor to provide a sign on the site.

Spartan argues, and the contracting officer agrees, that amendment 0001 had the following cost impact. The cost of the tool kit was \$175. The deletion of the armed guard reduced the contractor's cost by \$8,387.90. The herbicidal treatment increased costs by \$3,208. The sign increased cost by \$200. Therefore, the net effect of amendment 0001 was to decrease the cost of performance by the contractor by \$4,804.90.

Spartan contends that as the effect of amendment 0001 was to decrease the cost of performance, the failure to acknowledge the amendment by Spartan did not prejudice any other bidders because Spartan was undertaking to perform the contract under more onerous requirements. Therefore, the failure to acknowledge the amendment may be waived as a minor informality and the bid of Spartan should have been considered for award. Spartan cites B-167073, July 15, 1969, in support of this position. However, in that case, the amendment merely decreased the requirements under the IFB as issued with no increase in requirements.

The contracting officer, in rebuttal, states that our Office has applied two tests to determine the materiality of an amendment. First, the percentage of cost increases is compared to the total bid. Second, the cost increases are compared to the difference in

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the two low bids. Applying the above tests to the instant procurement, the increase in cost of performance caused by amendment 0001 (prior to offset by the concurrent decrease in cost) is \$3,583 or 3 percent of the low bid and over 100 percent of the difference of the two low bids (\$3,276) over the total contract period. Reliance is placed by the contracting officer on 53 Comp. Gen. 64 (1973) and AFB Contractors, Inc., B-181801, December 12, 1974, 74-2 CPD 329, in which we held increases of a smaller percentage than above not to be minimal and the bid nonresponsive. The contracting officer argues this result is required under Titan Mountain States Construction Corporation, B-183680, June 27, 1975, 75-1 CPD 393. That case involved an amendment which both increased and decreased the contract requirements. We considered the difference between the increasing and decreasing portion of the amendment, but treated each separately, and found that the \$1,600 increase in cost was trivial when compared to the total contract price. Therefore, we concluded that the bid could be accepted notwithstanding the failure to acknowledge the amendment. The amendment decreased the cost of performance between \$32,586 and \$126,663.

We believe the rationale of Titan must be applied to the bid of Spartan. Applying the materiality tests, supra, we do not view the \$3,583 increase in cost under amendment 0001 as de minimus and subject to waiver by the contracting officer. Therefore, it is unnecessary to consider whether the absence of an acknowledgement of clause L95 affects the responsiveness of the bid.

Spartan, in addition to the above challenges to the materiality of amendment 0001, contends that the reason it did not acknowledge the amendment is because it was never received. The contracting officer states that the amendment was mailed to all bidders and that all the other bidders acknowledged the amendment with their bids.

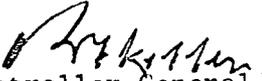
Generally, if a bidder does not receive a material amendment to an IFB and such failure is not the result of a conscious and deliberate effort on the part of the procuring activity to exclude the bidder from participating in the competition, the bid must be rejected as nonresponsive. Porter Contracting Company, B-184228, January 2, 1976, 55 Comp. Gen. _____. There is nothing in the record which indicates that the failure of Spartan to receive the amendment was the result of a deliberate attempt on the part of the agency to exclude it from competition.

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Notwithstanding its failure to receive the amendment, Spartan contends that it was aware of the contents of the amendment and took it into consideration in the preparation of its bid. The chief executive officer of Spartan attended a prebid conference on August 14, 1975, at which the contents of the then unissued amendment 0001 were discussed. In support of this contention, Spartan has submitted affidavits from the administrative contracting officer and the quality assurance representative for this contract attesting that Spartan was present at the prebid conference and that amendment 0001 was discussed.

While Spartan attended the prebid conference and from the record appears to have been aware of the contents of amendment 0001, this does not negate the necessity for acknowledging the amendment. In resolving questions of bid responsiveness, a bidder's intention must be determined from the bid itself and evidence submitted after opening to show a bidder's intent may not be considered. 42 Comp. Gen. 502 (1963) and 51 Comp. Gen. 352 (1971).

Accordingly, the protest of Spartan is denied.


Deputy Comptroller General
of the United States